Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

To: Chief, Common Carrier Bureau

CONSOLIDATED REPLY TO OPPOSITIONS TO AMSC SUBSIDIARY CORPORATION PETITION FOR RECONSIDERATION

AMSC Subsidiary Corporation ("AMSC") hereby replies to oppositions filed in response to AMSC's petition for partial reconsideration of the rate integration requirements established in the recent *Report and Order* in the above-referenced docket.[1/]

Introduction and Summary

AMSC again urges the Commission to reconsider the portion of its *Report and Order* that includes Mobile Satellite Service ("MSS") among the services that are subject to rate integration. Congress intended that its rate integration requirement apply only to providers of "interstate interexchange telecommunications services." Mobile Satellite Service as provided by AMSC is a unique service that includes an indistinguishable mix of local, interstate, and international communications services, and MSS therefore does not fall within this statutory classification. Alternatively, the Commission should clarify that AMSC's price mechanism, which correlates AMSC's rates to satellite power and reflects the need for greater power for calls to or from mobile terminals in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands, is consistent with the Commission's rate integration policy. The Commission has always recognized that unique economic and technical factors may warrant exceptions to full rate integration, and AMSC's rate structure is clearly supported by such considerations. Finally, if the Commission is not prepared

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1/ FCC 96-331 (August 7, 1996). AMSC requests a waiver of Section 1.429 of the Commission's rules, limiting replies to an opposition to a petition for reconsideration to 10 pages, so that its consolidated reply may exceed this limit by less than one page.

either to find that Section 254(g) does not apply to AMSC or that AMSC's rate structure is consistent with its integration policy, then the Commission should forbear from imposing rate integration on AMSC, at least with respect to AMSC's first-generation satellite. AMSC's price mechanism is correlated to costs and nondiscriminatory, and is justified by the riskiness and competitiveness of the mobile services market and AMSC's need for flexibility in pricing its services. Indeed, given the fragility of this market, should the Commission choose to impose rate integration on AMSC, this decision might jeopardize the successful development of domestic MSS; in contrast, the Commission's forbearance would have no adverse impact on the vast majority of long distance consumers in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands.

Background

As stated in its Petition for Reconsideration, AMSC's satellite system provides two-way mobile voice communications throughout the United States, including Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, and coastal waters.[2/] The successful deployment of this system represents the realization of a long-standing Commission goal to use satellite communications to provide critical two-way mobile communications in rural and remote areas. This system has the capacity to provide approximately 1500 voice channels for land mobile, maritime, and aeronautical communications. AMSC's first-generation satellite has five slightly overlapping beams. Three central beams cover the continental United States, one peripheral beam covers Alaska and Hawaii and nearby coastal areas, and a second peripheral beam covers Puerto Rico, the U.S. Virgin Islands, and a significant amount of the Caribbean.

In contrast to wireline and terrestrial wireless providers, when a subscriber is using one of AMSC's mobile terminals, AMSC cannot determine the location of the subscriber, other than identifying which of its five beams is being utilized. Each of these beams covers hundreds of

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2/ *Petition for Reconsideration*, AMSC Subsidiary Corporation, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61 (September 16, 1996) ("AMSC Petition").

thousands of square miles, and AMSC is therefore unable to identify the state or local exchange where the subscriber is located. As a result, AMSC is unable to distinguish between international, interstate, and intrastate traffic over its system. Moreover, a significant portion of the traffic in AMSC's peripheral beams is likely to be either international or local. This is the case because much of the traffic in these beams will be for maritime service, which is typically in international waters, outside the range of local terrestrial systems. Land mobile traffic in the system often involves communications within a local area, similar to typical cellular roaming traffic.

AMSC could discern interstate traffic from other kinds only if it equipped its mobile terminals with Global Positioning System capability along with the ability to transmit this locational data to AMSC's network operations facility. Such modification would likely require users to pay an additional $500-$1,000 per mobile terminal. This added cost would be prohibitive for many customers, particularly since most would derive little or no benefit from this capability.[3/] In addition, this modification would demand millions of dollars worth of changes in design of AMSC's earth station and switch, not feasible for a provider of this developing service.

Due to a combination of technological constraints and economic considerations, AMSC designed its first-generation system such that the amount of power required to communicate in either of the peripheral beams is more than twice that required to communicate in any of the central beams. AMSC is unable to reconfigure this system, with its satellite in orbit and no longer accessible for modification. AMSC expects, however, that its second-generation satellite will employ uniform power throughout its coverage area. The second-generation satellite is likely to be launched and in service in the near future.

AMSC has fashioned its rate structure for first-generation service in light of this power allocation, and its rates generally correspond to the amount of power required for the specific service involved. AMSC assesses a beam surcharge of 62-100 percent when a customer operates a mobile

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3/ *See, e.g.*, Comments of AMSC Subsidiary Corporation, In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102 (March 4, 1996).

terminal in an area served by one of the lower-power beams.[4/] These differences in rates provide AMSC with a price mechanism for allocating its limited power budget and assure that the satellite and the spectrum are used efficiently. The uniform power distribution achieved by AMSC's second-generation satellite will eliminate the need for this surcharge.

Oppositions to AMSC's petition for reconsideration were submitted by the States of Alaska ("Alaska") and Hawaii ("Hawaii"), and the Commonwealth of the Northern Mariana Islands ("CNMI").[5/]

Discussion

I. Rate Integration Should Not Apply to AMSC

AMSC's Petition is based in part on the fact that Section 254(g) is limited to "interstate interexchange telecommunications services," and AMSC's MSS service is not clearly such a service. In their oppositions, Alaska, Hawaii, and CNMI continue to insist that AMSC's service is no different from the mix of services offered by such carriers as AT&T, MCI, and Sprint.[6/] In so doing, these opponents fail to adequately consider the true nature of MSS, including AMSC's inability to distinguish between its international, interstate, and intrastate traffic.

Before a carrier can fairly be categorized as a provider of interstate interexchange telecommunications service, it should be possible to identify a specific, discrete portion of its service as interstate in nature. As stated above, because AMSC's service is mobile and utilizes a satellite with beams covering hundreds of thousands of square miles, AMSC cannot make this determination.

4/ *See* Letter to William F. Caton from Bruce D. Jacobs, Counsel to AMSC Subsidiary Corporation, dated October 16, 1996.

5/ Opposition of the State of Alaska to Petitions for Reconsideration, Partial Reconsideration, and Clarification, CC Docket 96-61, at 14 (October 21, 1996) ("Alaska Opposition"); Consolidated Opposition and Reply Comments of the State of Hawaii, CC Docket 96-61, at 13 (October 21, 1996) ("Hawaii Opposition"); Opposition to Petitions for Reconsideration, Commonwealth of the Northern Mariana Islands, CC Docket 96-61, at 11-12 (October 21, 1996) ("CNMI Opposition").

6/ Alaska Opp. at 14; Hawaii Opp. at 13; CNMI Opp. at 11-12.

AMSC knows of no other carrier, wireline or wireless, that is unable to distinguish between these different kinds of traffic. Carriers like AT&T, MCI, Bell Atlantic-NYNEX Mobile, and Sprint Spectrum know instantly whether calls transmitted over their networks are intraLATA, interexchange, or interstate. In light of this technical limitation, AMSC cannot fairly be deemed a provider of interstate interexchange services, and should not be subject to the rate integration requirements imposed upon these entities.[7/]

CNMI states that the Commission has previously rejected similar arguments focusing on the indistinguishableness of a carrier's traffic.[8/] CNMI specifically cites the Commission's 1995 order rejecting a debit card provider's request for preemption of state regulation of interstate 800-access debit card services.[9/] In fact, the Commission's decision there actually supports AMSC's position. In its preemption argument, the debit card provider asserted that it lacked the ability to distinguish between interstate and intrastate calls. In denying this request, the Commission did not find this technological limitation irrelevant; rather, the Commission pointed out that other debit card providers *did* have the ability to distinguish between intrastate and interstate traffic, and that these

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7/ Alaska and Hawaii both argue that the legislative history of Section 254(g) makes clear that Congress intended its statutory rate integration requirement to be more expansive than the Commission's pre-existing rate integration policy. Alaska Opp. at 14-15; Hawaii Opp. at 14 n. 34. While AMSC recognizes that the Telecom Act did broaden the scope of rate integration, the legislative history of this provision also plainly states that the Commission should incorporate the policies contained in the 1976 rate integration order into its new rules. Accordingly, the Commission should at least look to the 1976 order for guidance as it considers the reach of these requirements. As stated in its petition for reconsideration, the Commission's 1976 rate integration order contemplated the imposition of rate integration only on various fixed telecommunications services, including conventional long distance telephone service, "specialized services such as data and private line voice transmissions, and record carrying services. The 1976 Order does not appear applicable to a unique mobile service such as MSS, a factor which the Commission should give significant weight in the current analysis.

8/ CNMI Opp. at 12 n.35.

9/ In the Matter of The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services, Memorandum Opinion and Order, 11 FCC Rcd 1186, ¶¶ 32-38.

classes of traffic were therefore not "practically inseparable." In contrast, absent the massive redesign of a satellite system that has cost more than $650 million, interstate interexchange calls on AMSC's MSS will remain "practically inseparable."

Alaska argues that AMSC's beam surcharge also violates the Commission's new geographic rate averaging requirements.[10/] For the same reasons as those described above, however, the rate averaging requirement contained in Section 254(g) should not apply to AMSC. The inapplicability of rate averaging to AMSC is supported further by that provision's emphasis on the difference in rates between *rural* and *urban* areas. The primary function of MSS is to provide service to areas of the country too rural and remote to be served by terrestrial land mobile systems, and only a tiny fraction of land-mobile calls on AMSC's system will originate in urban areas. Moreover, it is irrelevant to the cost of MSS whether a call is placed from a rural or urban area; as described above, satellite power is the determinative cost factor for AMSC.

II. The Commission Should Find That AMSC's Surcharges Are Consistent with the Requirements of the Rate Integration Provision

In its *Report and Order*, the Commission did not address whether AMSC's surcharge on calls from the peripheral beams complies with the new statutory rate integration requirement. In AMSC's view, its surcharge is entirely consistent with rate integration, and it urges the Commission, if it determines that rate integration applies to MSS, to so find. As AMSC stated in its petition for reconsideration, the Commission recognized in its pre-Telecom Act rate integration orders that certain economic or technical factors could warrant some deviation from full rate integration. This recognition is reflected, for instance, in the Commission's long-time allowance for mileage bands. Even Hawaii in its Opposition recognizes that "[r]ate integration does not preclude a carrier from considering point-to-point costs in establishing its rates but, if the carrier does so, its methodology for passing those costs on to subscribers must be applied in a nondiscriminatory fashion to all point

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10/ Alaska Opp. at 15-16.

to point combinations."[11/] As shown above, AMSC's charges are correlated to its power requirements, and are not discriminatory.

III. The Commission Should Forbear from Applying Rate Integration to AMSC

Alternatively, if the Commission is not prepared to find that AMSC's current rate structure is consistent with its rate integration policy, then the Commission should forbear from imposing rate integration on AMSC's first-generation MSS system.[12/]

A. AMSC Satisfies the Three-Part Test for Commission Forbearance

To justify forbearance, AMSC must establish that enforcement of the Commission's rate integration requirement is unnecessary to ensure that AMSC's rates for its first-generation service are just and reasonable and not unjustly or unreasonably discriminatory. AMSC must also show that rate integration in the MSS context is unnecessary for the protection of consumers, and that forbearance is consistent with the public interest.

First, AMSC's surcharge is not unjustly or unreasonably discriminatory. As explained above, AMSC's 62-100 percent surcharge generally corresponds to the required power level for the specific service involved. Moreover, as AMSC has stated previously, this price mechanism is particularly reasonable in view of the size and risk of AMSC's investment and the competitiveness

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11/ Hawaii Opp. at 10.

12/ Alaska and Hawaii continue to maintain that the Commission lacks authority to forbear from imposing rate integration. Alaska Opp. at 2-3; Hawaii Opp. at 11. Alaska and Hawaii's interpretation of the statute and its legislative history is erroneous, and the Commission in fact possesses broad discretion to forbear from imposing rate integration. The plain language of Section 10 of the Telecom Act, which gives the Commission broad authority to "forbear from applying *any* regulation or *any* provision of this Act . . ." (emphasis added), could not be more clear. Also, Hawaii's argument that deviation from rate integration by definition constitutes unreasonable rate discrimination must fail. Hawaii Opp. at 11. As evidenced by the reasonable price mechanism used by AMSC, not all rate differentials are automatically "unreasonably" discriminatory. The Commission first applied rate integration policy only twenty years ago; Hawaii's argument, if adhered to, requires it to conclude that carriers were in violation of Section 202(a) prior to that order, a plainly untenable conclusion. *See* Comments of Sprint at 8-10 (discussing Commission decision in *Telegraph Service with Hawaii*, 28 FCC 599 (1960), recon. den. 29 FCC 716 (1960), denying request of Western Union to integrate Hawaii into its domestic rate pattern for telegraph message service).

of the mobile telecommunications services market.[13/]

Second, the imposition of rate integration on AMSC is not necessary for the protection of consumers, as forbearance in this context would have no adverse impact on the vast majority of long distance consumers in Alaska, Hawaii, Puerto Rico, or the U.S. Virgin Islands. In response to AMSC, Hawaii argues that AMSC's market share is irrelevant to the Commission's forbearance analysis, specifically to the consumer protection prong. In support of its position, Hawaii cites paragraph 40 of the Commission's *Report and Order*, where the Commission rejects the forbearance arguments of small long-distance carriers serving high-cost areas.[14/] Hawaii's interpretation of this decision, however, is erroneous. In denying these carriers' requested relief, the Commission did not dismiss the relevance of market share. Rather, the Commission merely stated that these carriers "have provided only conclusory allegations of harm and have not shown that they will be unable to compete with larger carriers in a rate-integrated environment." Moreover, the Commission was analyzing what effect *imposing* rate integration would have on *carriers*, not what effect *forbearing* from applying rate integration would have on *consumers*. A carrier's market share and position are key factors in this latter inquiry.

Finally, forbearance with respect to AMSC is consistent with the public interest. The parties opposing AMSC's petition assert that AMSC has shown only how the application of rate integration would harm its *business* interests, and does nothing to show how the *public* interest would suffer.[15/] It is clear, however, that any policy that jeopardizes the successful development of domestic MSS is harmful to the public interest. As the Commission recently stated, the public interest benefits from MSS are as significant today as they were ten years ago.[16/] MSS can serve areas of the country too remote to be served by terrestrial land mobile systems, and is uniquely suited for meeting the need of

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13/ AMSC Petition at 8-9.

14/ Hawaii Opp. at 13 n.32.

15/ CNMI Opp. at 15-16.

16/ *Notice of Proposed Rulemaking*, IB Docket No. 96-132, at 6-7.

the transportation, petroleum, and other vital industries. MSS can also meet rural public safety needs and provide emergency communications to any area during emergencies and natural disasters. The public interest is benefitted more by the existence of MSS as a viable communications option than it would be by the absence of any MSS system.

The imposition of rate integration would have serious impact on AMSC. It would disrupt AMSC's pricing mechanism, thereby preventing an optimal allocation of its limited power budget and the efficient use of its satellite and spectrum. As a result, AMSC would be much less likely to reach important revenue goals. Moreover, because of AMSC's inability to distinguish between intrastate, interstate, and interexchange traffic, this decision would place an additional burden on AMSC. While carriers are compelled to integrate rates only for interstate interexchange traffic, AMSC's inability to distinguish between these calls would require it alone to integrate rates for *all* kinds of traffic. This would be a harsh result for AMSC, given that a significant proportion of its MSS traffic in the peripheral beams is local and international.

B. Equity Favors a Grant of Forbearance to AMSC

The parties opposing AMSC's petition deny the significance of AMSC's reliance on the Commission's approval of AMSC's system design and tariff.[17/] Hawaii argues that AMSC should not be "reward[ed] . . . with relief from regulatory obligations because it has singled out some areas for special adverse treatment . . ." (no emphasis added).[18/] Hawaii fails to mention that the design of AMSC's satellite was determined in the Commission's extended MSS proceeding, where Hawaii and other parties had full opportunity to address any objectionable design elements.

Moreover, the Commission must be especially sensitive to reliance issues in the satellite context. Unlike terrestrial wireline and wireless networks, once a satellite is launched, cannot be modified. As a result, operators of such systems cannot easily adapt to dramatic regulatory changes like the one the Commission is now implementing. By imposing its rate integration requirement on

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17/ Alaska Opp. at 17; Hawaii Opp. at 13.

18/ Hawaii Opp. at 13-14.

AMSC's first-generation system at this late date, the Commission is penalizing AMSC both for sticking to its FCC-approved design plan and for taking a risk in the technologically inflexible realm of satellite communications.

C. The Commission Should Not Be Deterred by Opponents' Fears of a "Flood" of Forbearance Requests.

The parties opposing AMSC's petition for reconsideration warn the Commission that a grant of AMSC's request would be a "treacherous precedent" that would inevitably result in a "flood" of similar requests for forbearance.[19/] According to these parties' vision of justice, the Commission should withhold appropriate relief from a deserving party in order to avoid the rush of undeserving requests that might possibly follow. The Commission should reject their view. AMSC's unique situation is deserving of relief, and a decision to forbear in this instance would not undercut the purposes of rate integration. AMSC is the only domestic provider of MSS, a new and developing telecommunications service, and it is the only carrier of which it is aware whose service is an indistinguishable mix of intraLATA, interstate, and international traffic. With other providers unable to make a similar argument, opponents' fears of a torrent of forbearance requests are overstated.

19/ Hawaii Opp. at 11; CNMI Opp. at 15-16.

Conclusion

Therefore, based on the foregoing, AMSC again urges the Commission to exclude Mobile Satellite Service from those services subject to rate integration by finding that Congress did not intend to include MSS as an interstate interexchange service. In the alternative, the Commission should find that AMSC's rate structure is consistent with these rate integration requirements or is subject to forbearance.

Respectfully submitted,

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Dated: November 5, 1996

CERTIFICATE OF SERVICE

I, Cindi Smith Rush, a secretary to the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., hereby certify that on this 5th day of November, 1996, I served a true copy of the foregoing "Consolidated Reply To Oppositions To AMSC Subsidiary Corporation Petition For Reconsideration" by first class United States Mail, postage prepaid, upon the following:

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